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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-446

HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a-24a) is reported at 58 C.C.P.A. , C.A.D. 1017, 440 F.2d 1024. The opinions of the United States Customs Court, First Division, (Pet. App. 25a-66a) are reported at 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460, and at 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on April 22, 1971, and petition for rehearing was denied by that court on July 1, 1971. The petition for a writ of certiorari was filed September 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

QUESTION PRESENTED

Whether the United States Customs Court is vested with jurisdiction under Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b), so as to permit direct review by an American manufacturer of a determination by the Secretary of the Treasury that a foreign government does not bestow a bounty or grant on exportation of merchandise within the meaning of Section 303, Tariff Act of 1930, 19 U.S.C. § 1303.

ARGUMENT

1. The Court of Customs and Patent Appeals correctly determined that an American manufacturer may invoke section 516(b) to seek direct review of a refusal by the Secretary of the Treasury to find that the laws of Mexico constitute a bounty or grant on exportation of certain merchandise within the meaning of section 303 of the Tariff Act of 1930. As originally enacted in the Tariff Act of 1922, section 516(b) represented a distinct innovation in administration of the customs laws. By that provision, Congress established a remedy in favor of the American manufacturer, producer or wholesaler to "protest the classification of, or rate of duty assessed upon" imported merchandise, if of a class or kind manufactured, produced or sold by him, in a proceeding designed to increase the amount of

duty imposed on such imported merchandise. The American manufacturers' right to protest is entirely governed and limited by the express provisions of section 516(b), and it has been uniformly held that section 516(b) is the grant of an extraordinary privilege which must be strictly construed against the grantee. E.g., *Zinberg* v. *United States,* 16 C.C.P.A. 268, T.D. 42870; *The Cronite Co.* v. *United States,* 38 Cust. Ct. 76, C.D. 1847; *E. C. Miller Cedar Lbr. Co.* v. *United States,* 69 Treas. Dec. 330, T.D. 48161, aff'd 24 C.C.P.A. 272, T.D. 48701. Since enactment by Congress in 1922 of the American manufacturers' protest this is the first reported instance of an attempt to utilize section 516(b) to review a refusal by the Secretary to assess additional duties under section 303. In light of the fact that for nearly fifty years no one has attempted such review, one is struck by petitioner's assertion as to importance of the question from the viewpoint of the ability of American industry to protect itself from unfair trade practices.

Against this background the court below determined that the action of the Secretary in determining that the law of Mexico did not give rise to a bounty or grant within the meaning of section 303 involved neither classification nor a question as to rate of duty. The Secretary's determination that no bounty exists in the instant case is in accord with Congressional intent under section 303 and accords also with unbroken administrative practice of over seventy years in excluding from the category of bounty or grant the remission of taxes directly related to an exported product.

The term "classification" and the words "rate of duty"are settled expressions in customs administration and in light thereof the decision of the court below is

plainly correct. In enacting tariff legislation, Congress forms classes of merchandise by grouping them together into schedules, paragraphs, sub-paragraphs, and sections. "Classification by the administrative officers consists of the determination, according to legal rules and standards, of the narrowest particular class or division or category thus prescribed into which the imported merchandise falls." *E. C. Miller Cedar Lbr. Co.* v. *United States,* supra at 333. The process of classification is based upon investigation and examination of the characteristics of merchandise and such examination must relate to the merchandise at time of importation. *United States* v. *Lo Curto & Funk,* 17 C.C.P.A. 342, T.D. 43777. Tariff classification is thus the process of associating the imported article with the duty-rate description in the customs laws which most properly applies to it. Tariff Classification Study, Submitting Report, 44 (U.S. Tariff Comm'n 1960). Under the customs laws the collector of customs (the administrative officer in charge of a customs collection district) is the classification officer.[1]

Contrary to petitioner's contention, the action of the Secretary of the Treasury in determining whether the laws of a foreign government constitute a bounty or grant within the meaning of section 303 is clearly not "classification." It is evident, as noted by the court below, that the process of classification involves the examination of physical attributes or qualities inherent in imported merchandise in order to ascertain

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[1] See Act of June 17, 1930, § 500(a)(4), 46 Stat. 729, as amended, 84 Stat. 283 (1970), 19 U.S.C. § 1500(b) (Supp. 1970) which sets forth the duty of the appraising officer to "describe the merchandise in order that the collector may determine the dutiable classification thereof."

the narrowest particular description in the customs laws for the purpose of assessing the rate of duty fixed by Congress. By contrast, countervailing duty determinations under section 303 are not dependent upon any attribute or quality of imported merchandise but rather upon whether foreign laws give rise to a bounty or grant upon exportation of merchandise. Moreover, the question whether foreign laws give rise to a bounty often is a matter of considerable complexity, the decision of which has been committed to the Secretary of the Treasury under section 303. It is distinctly denied to the collector.

Nor does the Secretary's determination under section 303 involve a question of "rate of duty." This term as used in section 516(b) has been defined by the predecessor court to the Court of Customs and Patent Appeals as "the amount of duty assessed against imported merchandise, *resulting in the first instance, from the classification thereof.*" *Bradford Co. and U.S.* v. *Amercan Lithographic Co.,* 12 Ct. Cust. Appls. 318, 323, T.D. 40318 (1924) (emphasis added); and see *E.C. Miller Cedar Lbr. Co.* v. *United States,* 24 C.C. P.A. 272 at 279. Countervailing duties under section 303 are not fixed by statute so as to be a "rate of duty" resulting from classification. Indeed, far from being a rate fixed by statute the declaration of amount of bounty pursuant to section 303 has been committed by Congress to the Secretary and it has been uniformly held that the Secretary's declaration of amount is conclusive and may not be inquired into by the courts. *Franklin Sugar Ref. Co.* v. *United States,* 1 Ct. Cust. Appls. 242, T.D. 31276; *Franklin Sugar Ref. Co.* v. *United States,* 178 Fed. 743 (C.C.E.D. Pa. 1910); *V. Mueller & Co.* v. *United States,* 28 C.C.P.A. 249, C.A.D. 152.

The court below also pointed to the considerable difference between the provisions of section 514 of the Tariff Act of 1930, granting rights to importers to protest decisions affecting imported merchandise, and the provisions of section 516 governing the American manufacturers' protest. While the latter provision allows protest solely on the question of classification or rate of duty, section 514 authorizes the filing of protest by an importer in connection with

> [A]ll decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury). . . . 19 U.S.C. § 1514.

In contrast to the more narrow provisions of section 516(b), the provisions of section 514 provide for review by importers in extremely broad terms, including review of "all exactions of whatever character within the jurisdiction of the Secretary." Quite plainly the importer's right of review and those of the American manufacturer have not been meted out by Congress in equal measure.[2]

Finally, section 516(b) itself removes any basis for petitioner's claim that it may directly review the Secretary's determination by protest. Section 516(b) and, indeed section 514, provide means of protesting actions of the *collector*. Under the scheme of

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[2] The importer's statutory remedy to protest illegal exactions on imported merchandise, as provided in the Act of June 20, 1864, Rev. Stats. §§ 2931, 2932, was in substitution for a common law remedy whose antecedents pre-dated the Republic. See *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 254-55 (1845) (dissenting opinion of Story, J.).

section 516(b), where the Secretary determines that an existing classification and rate of duty are correct, he so informs the complainant who, if dissatisfied with the Secretary's decision, may file notice that he desires to protest. Upon receipt of such notice from the complainant, the Secretary is required to furnish the complainant with such information as to entries and consignees of such merchandise "as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port." The collector at such port is directed to notify complainant when the first of such entries is liquidated and, within thirty days of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Putting to one side the fact that the "description of the merchandise" required to be filed with the collector has everything to do with ascertaining which duty-rate description of the tariff laws applies (classification) while having nothing to do with the section 303 question whether the laws of a foreign country give rise to a bounty, it is clear from the statutory scheme that the American manufacturers' protest is against the collector's liquidation. If otherwise, there would appear to be no reason for the necessity of filing a protest with the collector in connection with the liquidation of an actual entry.

In cases where the action of the collector depends upon the validity of the action of the Secretary of the Treasury, the latter's action may be reviewed by the Customs Court upon a timely protest. E.g., *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. 119, 125,

C.A.D. 223. Thus, where an affirmative determination by the Secretary under the countervailing duty statute results in imposition of additional duties by the collector in obedience to the Secretary's instruction, validity of the Secretary's action under section 303 may be reviewed by timely protest under section 514. In the instant case, however, petitioner does not question the collector's decision as to classification or rate of duty but instead questions the determination by the Secretary of the Treasury refusing to find that the laws of Mexico give rise to a bounty. This is plainly an attempt to review an action the final determination of which has been conferred by Congress on the Secretary of the Treasury in section 303.

Indeed, even under the far broader provisions of section 514, the customs courts have uniformly held that the refusal of the Secretary to act is not reviewable upon an importer's protest. Importers have thus been denied review of the refusal by the Secretary to direct assessment of duty upon an amount less than the entered value of imported merchandise, *Kurz & Co.* v. *United States,* 13 Ct. Cust. Appls. 527, T.D. 41395; *Mills & Gibb* v. *United States,* 8 Ct. Cust. Appls. 31, T.D. 37164 and as well in cases involving refusal of the Secretary to remit or refund duties on ship's repairs caused by casualty at sea. *American Viking Corp.* v. *United States,* 37 Cust. Ct. 237, C.D. 1830; *Lykes Bros.* v. *United States,* 6 Cust. Ct. 467, C.D. 518; *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. 119, C.A.D. 223; *Portland California Steamship Co.* v. *United States,* 13 Cust. Ct. 170, C.D. 889. The underlying rationale of these decisions, equally applicable in the instant case, is that Congress under the statutes in question vested in the Sec-

retary exclusive authority to direct assessment upon an amount less than the entered value of merchandise (or to remit or refund duties on ship's repairs by casualty at sea) and a refusal by him to do either is not reviewable upon protest of the collector's liquidation in such cases since the authority is vested in the Secretary, withheld from the collector, and does not enter affirmatively into the collector's assessment or become a part of it. *Mills & Gibb* v. *United States,* supra at 37-39.

2. Petitioner's claim that the decision below conflicts with *North American Cement Corp.* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), lacks validity for a number of reasons, the most prominent being that different questions were before the two courts. The court in *North American Cement* dealt with reviewability of antidumping findings by the Secretary, the instant case with findings concerning foreign bounties. While part of the analysis by the court below does appear to be irreconcilable with *North American Cement,* the holdings of the two cases are clearly distinguishable.[3]

Moreover, even could a conflict be said to exist, it does not have continuing vitality. Where necessary to decision in a case before it, any court may attempt to construe the jurisdictional boundaries of a sister court but it is the latter court whose decisions on its

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[3] It is submitted that the decision in *North American Cement* is not persuasive authority for the different proposition determined therein. In support of its determination that a remedy exists in the Customs Court to contest a refusal by the Secretary to find sales of imports at less than fair value, the court relied on two cases which involved regular rate of duty questions clearly cognizable by the Customs Court under section 516(b). No further authority or rationale was offered.

own jurisdiction control those litigating before it. This is particularly true in the area of customs litigation where a specialized tribunal has been established by Congress.

3. Petitioner's final contention, that *rationale* utilized by the court below conflicts with *analysis* of two Supreme Court decisions, has an ethereal quality difficult to grasp. Again, petitioner admittedly does not contend that there exists a conflict between decisions but rather with respect to certain language bearing upon the penal character of section 303. *Downs* v. *United States,* 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), involved situations where the Secretary had in fact imposed countervailing duties and the question decided by the court below was not present. Even so, petitioner points to no inconsistency in underlying rationales. That a countervailing duty when assessed is equal to the amount of bounty or grant as determined by the Secretary by no means prevents it from being penal in nature. The countervailing duty statute is designed not to raise revenue but to serve as a preventive of what is considered unfair competition in international trade. Nor does it lack penal character because no willful or malicious conduct need be shown, a fact which has been held to enhance penal character. *Helwig* v. *United States,* 188 U.S. 605 (1903); *Cotonificio Bustese, S.A.* v. *Morgenthau,* 74 App. D.C. 13, 121 F.2d 884 (1941); 20 Ops. Att'y Gen. 660 (1893). The foregoing decisions, cited by the court below, dealt specifically with penal character of additional duties prescribed by Congress. *Downs* and *Nicholas,* supra, did not nor do they contain inconsistent language.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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